PRIVY COUNCIL REPORT.

SYED OMAR bin SHAIKH ALKAFF vs. SYED ABDULRAHMAN bin SHAIKH ALKAFF AND OTHERS.

[Privy Council (Lord Atkin, Lord Thankerton, Lord Romer, Lord Justice Clauson and Lord Justice Luxmoore) April 3, 1941]

Settlement — Construction — Direction to pay all rates, taxes and outgoings payable in respect of the trust premises out of income — Whether costs of rebuilding, sanitary installations and permanent improvements to the settled property should be charged to income.

In this case a Summons was taken out to determine

(a) whether upon the true construction of the Settlement and having due regard to the rights and parties interested thereunder the costs of rebuilding, sanitary installations and or permanent improvements to the settled property should be charged to income or corpus.

(b) In the event of it being declared that upon the true construction of the Settlement the cost of any such rebuilding, sanitary installations and/or permanent improvements should be charged to income up to what date having regard to the provisions of the Accumulations Act 1800 such items should continue to be debited to income.

(c) Whether the trustees of the Settlement may now recoup income out of corpus to the extent of all or any part of the expenditure that has been incurred upon the items set out in the schedule to the summons.

The Settlement contained **inter alia** the following provisions:—

(i) "The trustees shall in the meantime until the said trust premises shall have become vested ....stand possessed of the net annual rents and profits thereof which shall remain after payment of the expenses of the maintenance upkeep and repair of the buildings in the trust premises and all expenses of and incidental to the management and improvement of the trust premises and the execution of the trusts of these presents upon trust to divide the same annually among such of the male children or remoter male issue of the Settlor."

(ii) "The trustees in the meantime and until the vesting of the trust property in the ultimate beneficiaries shall have power to manage the trust premises....and out of the gross annual rents and profits received shall....after paying all rates taxes and outgoings payable in respect of the trust premises and other expenses of and incidental to the management and improvement of the trust premises and the execution of the trust of these presents make the various annual payments and deductions set forth in the third schedule."

(iii) "And it is hereby expressly agreed and declared that these presents shall not be deemed to confer upon the said trustees or trustee any power either express or implied to sell mortgage alienate or otherwise charge the said trust premises and that the said trustees or trustee shall not insure the same against any fire any statutory or other power to the contrary notwithstanding."

The trustees had incurred very substantial expenditure in rebuilding certain premises and particulars of these were set out in a schedule to the summons.

Held, (1) that upon the true construction of the settlement the whole of the expenditure specified in the schedule to the summons should be charged to income exclusively;

(2) that the provisions of the Accumulations Act 1800 do not operate to preclude the payment of the said expenditure out of income.

(3) that the trustees of the settlement are not entitled to recoup income out of corpus in respect of the said expenditure.

Cases referred to:—

(1) *Aldridge v. Ferne* 17 Q.B.D. 212.

(2) *Stockdale v. Ascherburg* (1904) 1 K.B. 447

(3) *Lowther v. Clifford* (1927) 1 K.B. 130.

Mr. C. R. Romer K.C. (*Mr. Wilfred Hunt* with him) for the appellants.

Mr. Charles Harman K.C. (*Mr. Withers-Payne* for Respondent No. 5 and *Mr. A. C. Nesbitt* for Respondents Nos. 1—4 with him) for the respondents

The judgment of the Privy Council was delivered by *Lord Justice Clauson:—*

This is an appeal from an order of the Court of Appeal of the Straits Settlements of the 29th April 1939 dismissing an appeal from an order of the High Court of the Straits Settlements of the 23rd February 1939, which made certain declarations with respect to matters relating to the execution of the trusts of a settlement dated 8th October 1901. This settlement which exhibits features which differentiate it very materially from the forms of family settlement commonly adopted in England, may be summarized as follows. The settlor conveys to certain trustees (all of whom are male descendants in the male line of the settlor or his deceased brother) certain house property in Singapore particularized in the first schedule, upon trust at the expiration of 21 years from the death of the survivor of 20 persons named in the second schedule (being the settlor himself and 19 persons who are male descendants in the male line of the settlor or his deceased brother) or at the time when all the male children of the settlor or his deceased brother being dead the youngest child of such male children who shall live to attain the age of 21 years shall attain that age, whichever event shall first take place, for such persons then living as are male grandchildren of the settlor or his deceased brother as

tenants in common in equal shares with various provisions (immaterial for the present purpose) to meet the case of a failure of male issue of the settlor or his deceased brother. The settlor then proceeds to deal with the annual rents and profits which will accrue before the class of persons to be beneficial owners of the property is ascertained as follows:—

"The Trustees shall in the meantime until the said trust premises shall have become vested under the trust last hereinbefore declared stand possessed of the net annual rents and profits thereof which shall remain after payment of the expenses of the maintenance upkeep and repair of the buildings in the trust premises and all expenses of and incidental to the management and improvement of the trust premises and the execution of the trusts of these presents upon trust to divide the same annually among such of the male children or remoter male issue of the Settlor and his deceased brother as shall from time to time be living during their respective lives in equal proportions but so that the issue of a deceased child shall take among them the share only which their parent or parents would have taken if living".

There follow provisions enabling the application of a minor's share of income for his maintenance and benefit and for the accumulation of any surplus interest for the minor if he attains 21 years, and directing that in case of his death under that age, the fund so accumulated is to be held upon the trusts of the settlement. Next follows a clause providing as follows:—

"The Trustees in the meantime and until the vesting of the trust property in the ultimate beneficiaries shall have power to manage the trust premises and to make allowances to and arrangements with tenants and others and to accept surrenders of leases and tenancies and to demise all or any part of the trust premises for any term of years not exceeding five years at the best rent to be reasonably obtained without taking a fine or premium and subject to such special covenants and provisions as may be deemed proper and out of the gross annual rents and profits received shall after paying to the acting trustees or trustee in Singapore a commission at the rate of two and a half per cent. on the gross profits and after paying all rates taxes and outgoings payable in respect of the trust premises and other expenses of maintenance upkeep and repair and all expenses of and incidental to the management and improvement of the trust premises and the execution of the trust of these presents make the various annual payments and deductions set forth in the third schedule hereto"

(being payments of comparatively trifling amounts of a charitable character). Next follow provisions preventing the alienation of any shares of income taken under the settlement. There is a provision that new trustees are to be selected from the male children and male issue of the settlor or his deceased brother. The only remaining provision of the settlement to which it is necessary to refer is the last clause which is as follows:—

"And it is hereby expressly agreed and declared that these presents shall not be deemed to confer upon the said trustees or trustee any power either express or implied to sell mortgage alienate or otherwise charge the said trust premises and that the said trustees or trustee shall not insure the same against fire any statutory or other power to the contrary notwithstanding".

It appears clearly from the terms of the settlement that the testator desires that the corpus of the trust property shall not be diminished by sale or mortgage in order to provide funds to discharge the various expenses which the trust may have to incur, but that those expenses are to be met out of the gross rents and profits of the trust estate before the amount is arrived at of the income to be divided among the beneficiaries. Further it is clear that some at least of these expenses thus to be borne by income are expenses which, in the absence of such special provisions as appear in the present settlement would, in the normal case of the administration of a corpus of property held in trust for tenant for life and remaindermen, fall on capital and not on income. As an example may be given the expense of appointing new trustees.

The settlor died on the 31st March 1910. It appears that although several of the persons named in the second schedule to the settlement have died the trusts for the ultimate beneficiaries are not likely to vest for a considerable time and the income in the meantime is divisible among a considerable number of persons.

In the year 1926 the then trustees of the settlement had occasion to apply to the Court for the purpose of obtaining an order, under certain statutory provisions corresponding generally to the Settled Estates Act 1877 of the Imperial Parliament, to enable the trustees to sell part of the trust property notwithstanding that they had no power to sell it according to the terms of the settlement. By the same summons the trustees asked to have it determined whether upon the true construction of the settlement the trustees were entitled to rebuild any of the premises belonging to the trust out of the income of the trust i the event of such rebuilding becoming necessary. It appears that a representation order was made in this proceeding appointing a representative of the adult beneficiaries and a representative of the infant beneficiaries, obviously in order to enable the Court to make an order for sale which would bind all the beneficiaries. There does not appear to have been any argument placed before the Court on behalf on the one hand of those interested in income and on the other hand of those interested in capital since there were no separate representatives of the respective interests in income and capital: but nevertheless the Court

declared (in an order of the 18th September 1926) that on the true construction of the settlement the trustees were entitled to rebuild any of the premises forming part of the settled estate out of the income thereof in the event of such rebuilding becoming necessary. Before and after the date of that order the trustees incurred very substantial expenditure the particulars of which appear in the schedule to the summons next mentioned: and by an originating summons of the 28th July 1938 the trustees initiated the proceedings, the subject matter of the present appeal, the trustees being plaintiffs and the appellant to His Majesty in Council being defendant. The relief asked, so far as it is material to the matters before their Lordships, was as follows:—

(1) Whether upon the true construction of the Settlement and having due regard to the rights of the parties interested thereunder the costs of rebuilding, sanitary installations and/or permanent improvements to the settled property should be charged to income or to corpus.

(2) In the event of it being declared that upon the true construction of the Settlement the cost of any such rebuilding, sanitary installations and/or permanent improvements should be charged to income up to what date having regard to the provisions of the Accumulations Act 1800 such items should continue to be debited to income.

(3) Whether the trustees of the Settlement may now recoup income out of corpus to the extent of all or any part of the expenditure that has been incurred upon the items set out in the schedule to this summons.

* * * * * *

(7) That for the purposes of this summons the defendant be appointed to represent all life tenants entitled under the Settlement, and that Dr. C. H. Withers-Payne be appointed to represent all remaindermen entitled under the Settlement.

In due course an order was made that for the purposes of the summons the present appellant should be appointed to represent all life tenants entitled under the settlement, and that Dr. Withers-Payne, the last respondent before their Lordships' Board, be appointed to represent all remaindermen entitled under the settlement. The evidence filed consisted of an affidavit by one of the trustees, and an affidavit by Mr. Brewer, a local architect and surveyor. From the trustees' affidavit it appears that since 1922 the trustees had when required by the Municipal Commissioners from time to time installed sanitary appliances in houses subject to the trusts of the settlement and they had also partly rebuilt and made permanent improvements to some of the trust properties: and that they had expended money on architects' supervision fees, fees paid to the Municipal Commissioners upon the submission of plans in cases of rebuilding and legal costs in connection with various questions arising out of the provisions of the Municipal Ordinance and other matters: and that the whole of the expenditure had so far been debited to income exclusively. The affidavit states the earlier proceedings in 1926 relating to the trust and explains that three of the four trustees who are life tenants have complained about the effect on the income of debiting the cost of sanitary installations rebuilding and other similar items against income alone and that the trustees on taking legal opinion in regard to these complaints have only now discovered that items of the kind above referred to may in some cases be more properly chargeable against capital. The affidavit proceeds to state that the trustees have at their disposal certain funds representing capital arising from certain compensation paid by the Singapore Improvement Trust in respect of acquisitions made by them, but that these funds would be unlikely to be sufficient for the purpose of recoupment if recoupment is ordered. The affidavit of the architect and surveyor deals with the sums expended on the reconstruction of the three houses which have been reconstructed and expresses the view that in each case the value has been increased by at least the amount of the expenditure, and that the whole of the expenditure should be attributed to permanent improvement.

The originating summons came before Pedlow J. on the 23rd February 1939. It was argued before him that the effect of the order made on the summons of 1926 that upon the true construction of the settlement the plaintiffs were entitled to rebuild any of the premises forming part of the settled estate out of income did not operate as "res judicata" in regard to the matter before him. His Lordship regarded that order as simply saying that if rebuilding becomes necessary the trustees can if they wish rebuild out of income, and not as deciding that if they rebuild at all they must rebuild out of income. He proceeded to hold that the vital question was what was the intention of the settlor and what did he direct: and were his directions capable of being carried out: and his Lordship expressed the opinion and held that the settlor wished the trustees to keep the capital intact and to pay out of income all expenses of maintenance upkeep and repair of the trust premises and all expenses of and incidental to the management and improvement and the execution of the trust: in other words that all expenditure whatsoever was to come out of income. His Lordship added: "I know of nothing which would make it unusual for an Asiatic settlor to take this attitude to his estate", and referred to the clause refusing to confer on the trustees

any power either express or implied to sell mortgage alienate or otherwise charge the trust premises as bearing out this view of the settlor's intentions. As to clause 2 of the summons his Lordship held that the Accumulations Act 1800 did not apply to the matter. His Lordship observed that it might have applied till the death of the settlor in 1910, but that the expenditure with which he was concerned all took place since that date, and since 1910 there had been no trust for accumulation but a trust for an annual distribution of income. His Lordship then expressed the view that it followed that there was to be no recoupment out of corpus.

Although the judgment of the learned Judge as delivered appears to relate only to the items of expenditure dealt with in the evidence, his order as drawn up follows the first paragraph of the summons and declares in general terms that upon the true construction of the settlement the whole cost of rebuilding, of sanitary installations and for permanent improvements to the settled property should be charged to income exclusively. The order goes on to declare that the provisions of the Accumulations Act 1800 do not apply to the settlement so as to limit the period during which the whole cost of rebuilding sanitary installations and for permanent improvements is chargeable exclusively to income. It is then declared that the trustees are not entitled to recoup income out of corpus in respect of any of the expenditure incurred upon the items set forth in the schedule to the originating summons. The order goes on to authorise by consent a sale to the Municipal Commissioners and the Singapore Investment Trust of any property subject to the trusts of the settlement required by either of those bodies for the purposes of the Municipal Ordinance or the Singapore Improvement Ordinance. No question was raised on this part of the order either on appeal to the Appeal Court or before their Lordships and no further reference need be made to it.

Their Lordships find some difficulty in ascertaining what arguments were placed before the learned Judge in regard to the Accumulations Act 1800, and they find a corresponding difficulty in ascertaining from the learned Judge's judgment as delivered precisely what view he took as to the operation if any of that Act upon the terms of the settlement. It is clear however that he was satisfied that nothing in the Accumulations Act rendered void the clause in the settlement dealing with the expenditure to be made by the trustees out of income.

The present appellant before their Lordships' Board, representing income, appealed against the order of Pedlow J. to the Court of Appeal of the Straits Settlements and on the 29th April 1939 that Court consisting of the Chief Justice of the Straits Settlements (McElwaine C.J.), the Chief Justice of the Federated Malay States (Poyser C.J.), and Terrell J. dismissed the appeal. Chief Justice McElwaine took the view, differing in that regard from Poyser C.J., that the order made on the summons of 1926, on its true construction determined that the trustees were entitled to rebuild out of income and not out of corpus, and that the question raised in the present proceedings was in substance the same and the decision in the present case must be the same as in the former: and on that ground he was prepared to reject the appeal. He however went on to express his own view as to the construction of the settlement. In his opinion the final paragraph in the settlement refusing the trustees any power of alienation had the effect of forbidding the trustees to realise the corpus in order to pay for anything which they can or must do under the settlement, the settlor's intention being that his landed property should be retained and perhaps increased but not diminished. On this ground he held the orders made on the 1926 summons and the order of Pedlow J. under appeal to be right. Chief Justice Poyser took the view that the order made in 1926 would not prevent the trustees applying to the Court in the future for permission to reconstruct other buildings or make other permanent improvements. His Lordship pointed out that circumstances might arise, e.g. a fire destroying a large number of buildings which would justify an order for debiting corpus with the cost of rebuilding. In his Lordship's opinion it was not now open to the tenants for life to ask that permanent improvements already made and authorized by the Court to be paid for out of income should now be paid for out of corpus. He however found it unnecessary specifically to decide the point, for he was prepared to hold that the Judge was right in holding that none of the items referred to in the summons should be charged to corpus, on the ground that the settlor's intentions were clear that the cost of all improvements and rebuilding should be met out of income. His Lordship did not deal with the second question in the summons as to the Accumulations Act 1800 as he understood it to be conceded that as there was no trust for accumulation the question did not arise. Terrell J. was also in favour of rejecting the appeal. He held that the decision on the 1926 summons decided that the trustees on the true

construction of the settlement were entitled to rebuild out of income but did not decide whether the trustees could rebuild out of corpus. His Lordship however held that on the true construction of the settlement the trustees have a definite duty to pay out of income such things as rates and taxes and the current expenses of maintenance and repairs: they also have a discretion to make more permanent improvements and rebuild and if they exercise such discretion the expenses involved are also payable out of income. In his view those representing income really wanted the Court to say that the trustees' discretion was wrongly exercised, and he could see no ground whatever for so finding.

The present appellant, representing income, now appeals from the decision of the Court of Appeal, and in the first place questions the correctness of the view on the construction of the settlement adopted by Pedlow J. and as it would seem approved by each of the Judges of the Court of Appeal that the settlor's intention is clearly shown by the very special and peculiar terms of the settlement to be that all expenses which the trustees are directed or empowered to make out of the trust funds are to be made by them out of income. It was admitted by the appellant that the payments referred to in the schedule to the summons were not made in breach of trust. No objection was made before their Lordships to the payment of the expenses out of income save only the road making expenses, items 6 and 7 in the schedule. It was urged that these expenses though admittedly properly paid were of such a character that they ought to be borne in part at all events by the corpus of the property, on the ground that if they remained unpaid the Municipal Commissioners could, under the relative statutory provisions, recover them by way of enforcing a charge upon the portions of the trust properties fronting on the various roads. Their Lordships are ready to assume that that would be the case. They are however satisfied that the expressions used by the settlor are sufficient to make it clear that even so the expenses in question should be borne out of income. The settlor directs that all outgoings are to be paid out of income: and the word outgoings, a word of wide meaning, as explained in such English decisions as *Aldridge v. Ferne*[1], *Stockdale v. Ascherburg*[2], and *Lowther v. Clifford*[3] is sufficient in itself in their Lordships view to cover such expenditure as is in question. The addition however of the words "expenses of and incidental to the execution of the trusts of these premises" removes, in their Lordships' view, any possible doubt. The trustees cannot properly execute their trust unless they defray these expenses and thus protect the trust property from the Commissioners' claim for the liquidation of these expenses, and expenses incurred in thus executing their trust are expressly directed to be paid out of income.

A further criticism upon the order made on behalf of the appellant was that the expenses appearing in the 9th clause in the schedule to the summons included a sum (viz. $1,600) for the acquisition of further property to be added to the trust property. It was admitted (and in their Lordships' view rightly) that this purchase was perfectly proper as being merely incidental to the rebuilding of the property mentioned in the clause, and was not made in breach of trust. It was argued however that the approval of this expenditure might hereafter be used to justify an expenditure of income in purchasing property to be added to the trust corpus. Their Lordships are of opinion that the order should be framed in such a way as to indicate that it is the expenditure on this particular purchase which has been sanctioned by the Court, such expenditure being in truth mere expenditure incidental to the rebuilding; and they accordingly think it desirable that the first declaration in the judgment of Pedlow J. should be confined to the expenditure particularized in the schedule to the summons. This variation of the order has the advantage that it limits the declaration so as to accord with the judgment of Pedlow J. as delivered, which is in terms limited, as regards the matter of the first declaration, to the items referred to in the schedule to the summons. This will also preclude any possibility of a future argument that the order affects the exercise by the Court, should the appropriate circumstances exist in the future, of such power if any as the Court may be found to have, under statute or otherwise, of overriding the settlor's intention that all expenses should fall on income.

It will be observed that this declaration in the order, varied to the extent above suggested, necessarily implies that in their Lordships' judgment the clauses in the settlement to which reference is made are not in any way made null and void by the Accumulations Act 1800. Objection was taken to the form of the second declaration in the order of Pedlow J. on the ground that the trustees might in the future exercise the power conferred on them in the settlement of expending income in such a manner as to occasion an infringement of the Accumulations Act 1800. Whether the trustees could do any such thing without committing a breach of trust and what operation the Act would have in the circumstances are questions on

which it is undesirable to make any pronouncement until the circumstances occur which give rise to them. It is not suggested that any of the expenditure particularized in the schedule to the summons was made in breach of trust or results in fact in accumulation. Their Lordships do not regard the form of the second declaration in Pedlow J.'s judgment as happily worded. They think that it would be better to confine the reference to the Accumulations Act 1800 to a declaration to the effect that the provisions of the Accumulations Act 1800 do not operate to preclude the payment out of income of the expenditure specified in the schedule to the summons.

In the view that their Lordships take of the matter, there is (as indeed all the Judges in the Court below appear in substance to agree) no need to make any pronouncement on the question of how far the existence of the order made on the 1926 summons might have operated to preclude the Court from making a declaration inconsistent with that order.

As regards the costs of the matter before Pedlow J. no objection has been or can in their Lordships' view properly be made to the terms of his Lordship's order relating to them. In the Court of Appeal certain costs were thrown upon the appellant. In all the circumstances of the case their Lordships think that all the costs of that appeal, including the appellant's, may properly be ordered to be paid by the trustees out of income; and their Lordships take the same view as to the costs of all parties before their Lordships' Board.

Their Lorships will humbly advise His Majesty that the first three paragraphs of the order of Pedlow J. be discharged and that the following declarations be made in lieu of those paragraphs namely:—

1. That upon the true construction of the above mentioned settlement the whole of the expenditure specified in the schedule to the summons should be charged to income exclusively.
2. That the provisions of the Accumulations Act 1800 do not operate to preclude the payment of the said expenditure out of income.
3. That the trustees of the settlement are not entitled to recoup income out of corpus in respect of the said expenditure.

and also that so much of the order of the Court of Appeal as orders the plaintiffs to pay the costs of the respondents in that Court should be discharged and that in lieu it be ordered that the trustees do retain and pay out of the income of the settled estate the costs of all parties of the appeal to that Court the costs retained by the trustees to be taxed as between solicitor and client and the costs of the other parties on the higher scale.

The costs of all parties of the appeal to His Majesty in Council (those of the trustees to be taxed as between solicitor and client) will be ordered to be retained and paid by the trustees out of the income of the settled estate.

Order accordingly.

F. M. S. REPORTS.

PUBLIC PROSECUTOR vs. NG. CHONG.

[App. Crim. Juris. (Terrell, Ag. C.J., F.M.S., McElwaine, C.J., S.S. and Aitken, Ag. J.A.) May 24, 1941]

Road Traffic Enactment, Section 116 (1) — Making statement for the purpose of obtaining a licence, knowing it to be false — Person liable only if he is aware of the statement which he is charged with making.

The respondent applied for a renewal of his licence to drive a public vehicle and to obtain the renewal he had to sign an application form. He did not read or write English, and therefore asked a clerk of the company which employed him to fill in the form for him. The answer to a question asking whether he had been convicted of any offence since his last application, was given as "No". The respondent had in fact been twice convicted of offences connected with the driving of motor vehicles. He was charged under Section 116 (1) (a) of the Road Traffic Enactment which so far as material reads "If any person for the purpose of obtaining the grant of any licence to himself, makes any statement which to his knowledge is false, he shall be liable on conviction to a fine of one thousand dollars or to imprisonment for a term of twelve months or to both such fine and imprisonment."

Held, by the Court of Criminal Appeal (Terrell, Ag. C.J., F.M.S. and McElwaine, C.J., S.S., Aitken, Ag. J.A. (dissenting)), that in a prosecution under Section 116 (1) of the Road Traffic Enactment, it must not only be proved that the statement was false, but also that it was consciously made and known to be false. Before a Magistrate can convict, he must be satisfied that the accused was aware of the statement which he was charged with making.

Cases referred to:—

(1) *P. P. vs. Sin Lee Yok* (1940) M.L.J. 40; (1939) F.M.S.L.R. 112.
(2) *R. vs. Dacey* 27 Cr. A. Reports 86.
(3) *Dickins vs. Gill* (1896) 2 Q.B. 310.
(4) *Bank of New South Wales vs. Piper* (1897) A.C. 383.